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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

THE PEOPLE, Plaintiff and Respondent, v. STEVEN WERNER MUECK, Defendant and Appellant.	C078223 (Super. Ct. No. NCR81726)

Defendant Steven Werner Mueck, an inmate serving 25 years to life in prison following conviction of a felony that was not violent (as defined by Pen. Code, §667.5, subd. (c)) [1] or serious (as defined by § 1197.2, subd. (c)), filed a petition pursuant to Proposition 36, the Three Strikes Reform Act of 2012, to have his sentence recalled and to be resentenced. (§ 1170.126, subd. (b).) The Proposition 36 court denied the petition,

[1] Further undesignated statutory references are to the Penal Code.

finding resentencing defendant would pose an unreasonable risk of danger to public safety. Defendant's sole contention on appeal is that the Proposition 36 court erred in denying his petition because it refused to apply the definition of " 'unreasonable risk of danger to public safety' " (§ 1170.18, subd. (c)) in Proposition 47, the Safe Neighborhoods and Schools Act (§ 1170.18, subd. (c)),[2] in considering his Proposition 36 petition.

We shall conclude that Proposition 47's definition of "unreasonable risk of danger to public safety" has no bearing on the Proposition 36 finding of dangerousness and affirm the order denying the petition.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2012, defendant pleaded guilty to offering to bribe a witness (§ 137, subd. (a)), and admitted two prior strike offenses. On June 4, 2012, he was sentenced to 25 years to life in state prison.

In July 2014, defendant filed a petition to recall his sentence and for resentencing pursuant to section 1170.126.

Later in July 2014, the Proposition 36 court determined that defendant had presented a prima facie case for relief and set the matter for a qualification hearing.

In October 2014, the Proposition 36 court referred the matter to probation for an updated report for resentencing.

On November 4, 2014, California voters approved Proposition 47, which took effect November 5, 2014. (Cal. Const., art. II, §10, subd. (a).)

On November 14, 2014, the People filed a brief in opposition to defendant's petition, arguing that his release would present an unreasonable risk of danger to public safety under section 1170.126, subdivision (f).

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[2] This issue is pending before the California Supreme Court in *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted February 18, 2015, S223825.

On November 19, 2014, the Proposition 36 court ordered the parties to file supplemental briefs addressing whether Proposition 47's definition of "unreasonable risk of danger to public safety" was applicable to determining suitability for resentencing under Proposition 36.

In early December 2014, both sides filed their respective briefs, and thereafter, the People filed two additional briefs on the issue. In their third supplemental brief filed January 2, 2015, the People alerted the court to the Fifth Appellate District's recent decision in *People v. Valencia*, *supra*, 232 Cal.App.4th 514, holding that Proposition 47's definition of "unreasonable risk of danger to public safety" does not apply to resentencing petitions under Proposition 36.[3] (*Valencia,* at p. 519, 533.)

On January 14, 2015, a hearing was held on defendant's suitability for resentencing. As a preliminary matter, the Proposition 36 court indicated that it would follow the Fifth Appellate District's decision in *People v. Valencia* and would not utilize the Proposition 47 definition of "unreasonable risk of danger to public safety" in considering defendant's petition. The Proposition 36 court then found that resentencing would pose an unreasonable risk of danger to public safety and denied the petition.

DISCUSSION

Effective November 7, 2012, the voters enacted Proposition 36. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167, 169-170.) Among other things, Proposition 36 added section 1170.126, which provides that certain eligible inmates serving indeterminate life sentences under the Three Strikes law may petition the trial courts for reductions in their sentences. As relevant here, that section provides that an inmate,

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[3] As set forth above, *ante* footnote 2, the California Supreme Court granted review in that case on February 18, 2015.

otherwise eligible for resentencing,[4] "shall be resentenced [as a second striker] unless the court, in its discretion, determines that resentencing . . . would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)[5]

Effective November 5, 2014, the voters enacted Proposition 47. (Cal. Const., art. II, § 10, subd. (a).) Proposition 47 reduced to misdemeanors certain drug-and-theft-related offenses that previously were felonies or "wobblers," unless they were committed by certain ineligible defendants. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108; see § 1170.18, subd. (i).) It also created a mechanism by which a person who is currently serving a felony sentence for an offense that is now a misdemeanor may petition for a recall of that sentence and request resentencing. (§ 1170.18, subd. (a).) Pursuant to Proposition 47, an inmate otherwise eligible for resentencing shall have his felony sentence recalled and be resentenced to a misdemeanor, "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of

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[4] "An inmate is eligible for resentencing if: [¶] (1) The inmate is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or subdivision (c) of Section 1170.12 for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7. [¶] (2) The inmate's current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12. [¶] (3) The inmate has no prior convictions for any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." (§ 1170.126, subd. (e).)

[5] "In exercising its discretion in subdivision (f) [of section 1170.126], the court may consider: [¶] (1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; [¶] (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.126, subd. (g).)

danger to public safety." (§ 1170.18, subd. (b).) Of particular relevance here, Proposition 47 further provides: "*As used throughout this Code*, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667." (§ 1170.18, subd. (c), italics added.) Section 667, subdivision (e)(2)(C)(iv) lists the following felonies, sometimes called "super strike" offenses:

" (I) A 'sexually violent offense' as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code.

"(II) Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than he or she as defined by Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than he or she as defined by Section 286, or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than he or she, as defined by Section 289.

"(III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288.

"(IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive.

"(V) Solicitation to commit murder as defined in Section 653f.

"(VI) Assault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245.

" (VII) Possession of a weapon of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418.

"(VIII) Any serious and/or violent felony offense punishable in California by life imprisonment or death."

Relying on section 1170.18, subdivision (c)'s preamble, "As used throughout this Code," defendant contends the trial court erred "when it refused to apply the narrow

statutory definition of 'unreasonable risk of danger to public safety' under Proposition 47 in deciding whether to grant the Proposition 36 petition to recall the third strike sentence and sentence [defendant] as a second strike offender."

Our colleagues in the Fifth Appellate District recently rejected this argument in *People v. Bufford* (2016) 4 Cal.App.5th 886, review granted January 11, 2017 S238790 (*Bufford*),[6] concluding that the "literal meaning [of section 1170.18, subdivision (c)] does not comport with the purpose of [Proposition 36], and applying it to resentencing proceedings under [Proposition 36] would frustrate, rather than promote, that purpose and the intent of the electorate in enacting both initiative measures [citation]." (*Id.* at p. 907; see also *People v. Esparza* (2015) 242 Cal.App.4th 726, 736-737 [declining to apply Proposition 47's definition of "unreasonable risk of danger to public safety" in Proposition 36 resentencing proceeding].) Among other things, the *Bufford* court noted that "[n]owhere . . . do the ballot materials for [Proposition 36] suggest voters intended essentially to release existing third strike offenders in all but the most egregious cases, as would be the result if the definition of ' "unreasonable risk of danger to public safety" ' contained in section 1170.18, subdivision (c) were engrafted onto resentencing proceedings under section 1170.126, subdivision (f)." (*Bufford* , at p. 908.) Similarly, the court noted that "[n]owhere in the ballot materials for Proposition 47 were voters given any indication that initiative, which dealt with offenders whose current convictions would now be misdemeanors rather than felonies, had any impact on Proposition 36—enacted a scant two years earlier—which dealt with offenders whose current convictions *would still be felonies*, albeit not third strikes. . . . In explaining what Proposition 47

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[6] Pursuant to California Rules of Court, rule 8.1115(e)(1), the court's opinion in *Bufford* remains published and retains persuasive value despite the Supreme Court's grant of review. In addition to granting review, the Supreme Court deferred further action in the matter pending consideration and disposition of *People v. Chaney*, S223676, and *People v. Valencia*, *supra*, 232 Cal.App.4th 514, review granted.

would do, the Legislative Analyst stated: 'This measure reduces penalties for certain offenders convicted of *nonserious and nonviolent property and drug crimes*. . . .' [Citation.] With respect to the resentencing provision, the Legislative Analyst explained: "This measure allows offenders *currently serving felony sentences for the above crimes* [i.e., grand theft, shoplifting, receiving stolen property, writing bad checks, check forgery, and drug possession] to apply to have their felony sentences reduced to misdemeanor sentences.' " (*Id.* at pp. 909-910.)

We find the *Bufford* court's reasoning and conclusions persuasive.

DISPOSITION

The order denying the petition is affirmed.

/s/
Blease, Acting P. J.

We concur:

/s/
Robie, J.

/s/
Hoch, J.